IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION, LTD., et als

Appellants

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Appellees

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLANTS

THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION

Harold C. Warnock
Boyle, Bilby, Thompson & Shoenhair
9th Floor
Valley National Building
Tucson, Arizona 85701

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

TEXTS

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE FLUOR CORPORATION, LTD., et als

Appellants

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Appellees

No. 21307
No. 21307A
No. 21307B
No. 21307C

BRIEF OF APPELLANTS

THE FLUOR CORPORATION LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPOATION

I.

JURISDICTIONAL STATEMENT

In the interest of brevity, these appellants adopt the statements contained in the brief of Appellant Union Tank Car Company (Union) under this heading, with the following supplement:

The only count of the amended complaint (R. 268) which involves these appellants is Count I, brought under the Miller Act (40 U.S.C. § 270). Judgment was rendered in favor of the use plaintiff on this count May 24, 1966, in the sum of $246,165.96 against Fluor and the Sureties, which filed notice of appeal July 18, 1966.

II.

STATEMENT OF THE CASE

Fluor and the Sureties adopt the statement of the case contained in the brief of Appellant Union Tank Car Company with the following supplement:

Count I of the complaint alleges that Fluor Corporation, Ltd. (Fluor) entered into a written contract dated May 29, 1961, with the United States of America whereby Fluor agreed to construct certain Titan II missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona; that Fluor as principal and the Sureties above named entered into a bond under the Miller Act; that Appellant Union, and Idaho-Maryland Industries, Inc., and Ward Industries Corporation, a joint venture (IMI-Ward)[1] were sub-contractors of Fluor.

Count I further alleges (R. 270) that the use plaintiff, Mosher Steel Company (Mosher) "at the special instance and request of Union . . ." and, in addition, at the special instance and request of IMI-Ward had "furnished, fabricated and delivered certain steel which was incorporated . . . ." in the missile launch facilities,

[1] Idaho-Maryland Industries (IMI) having gone into bankruptcy, was not a party to this action for reasons which will be made clear later in the briefs. Union's contract was carried out by its Graver Tank division and the terms "Union" and "Graver" are interchangeable.

and had failed to pay Mosher $298,336.50, being the reasonable value of the material fabricated.

The amended answer of Fluor and the Sureties (R. 426) admitted that the use plaintiff had furnished fabricated material to IMI-Ward, denied that IMI-Ward was a subcontractor of Fluor, alleging that IMI-Ward was a second-tier subcontractor, and denied that Flour had required the materials to be furnished or that such materials were furnished with Fluor's knowledge, consent or approval.

All other counts of the amended complaint involved Union or Ward, but not Fluor or the Sureties.

Against Mosher's claim of $298,336.50, it developed at the trial that Mosher had received IMI stock out of the IMI bankruptcy. Mosher finally stipulated (R.T. 681) that this stock had a value of $52,170.62, which the court credited to the defendants in its judgment.

On May 24, 1966, judgment was rendered against Fluor and the Sureties for $246,165.96 (R. 1241).

The judgments against the various parties were arrived at by the Court as follows (R. 1239):

Total Claim of Mosher	$321,053.54
Credit IMI stock received by Mosher:	52,170.62
Judgment against Union and Ward:	268,882.92
Material furnished Vandenberg job:	22,716.96
Judgment against Flour and Sureties on Miller Act bond:	246,165.96

On July 18, 1966, Fluor and the Sureties filed Notice of Appeal from the judgment rendered against them.

III.

SPECIFICATION OF ERROR

THE COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT THE RELATIONSHIP BETWEEN UNION AND MOSHER CONSTITUTED A "DIRECT CONTRACTUAL RELATIONSHIP" WITHIN THE MEANING OF THE MILLER ACT (40 U.S.C. § 270B) AND IN RENDERING JUDGMENT AGAINST FLUOR AS PRIME CONTRACTOR AND AGAINST THE SURETIES UNDER THE MILLER ACT BOND.

IV.

ARGUMENT

Summary

Under the Miller Act, the prime contractor or its surety is not liable to a materialman supplying a sub-subcontractor. The promise which the trial court found had been made by Union to Mosher, to the effect that Union would pay the obligations of IMI-Ward to Mosher, is not the "direct contractual relationship" contemplated by the Miller Act.

The Miller Act provides in part (40 U.S.C. 270b): ". . . . any person having direct contractual relaitonship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing said payment bond, shall have a right of action upon said payment bond upon giving written notice to said contractor within 90 days . . ."

Union was the subcontractor for the prime contractor, Fluor, and IMI-Ward, holding a contract under Union, was a *sub*-subcontractor or second-tier subcontractor. Mosher, the plaintiff-appellee here, was a materialman to IMI-Ward. Whether Mosher was a materialman or a *sub-sub*-subcontractor is immaterial, *Elmer v. USF&G Co.* (C.A.5, 1960) 275 F.2d 89. In either event, it is not entitled to recover under the Miller Act. *Clifford F. MacEvoy v. U.S.*, 1944, 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1163.

Nevertheless, the Court found against Fluor and the Sureties and rendered judgment against them in the sum of $246,165.96. It also found against Ward as a member of IMI-Ward, to which the materials were delivered (Conclusion of Law 4, R. 1238) and against Union (Conclusion of Law 6) on the basis of a telephoned promise made by Page, Union's controller, to Moore, Mosher's credit manager. The facts found by the Court as to this promise are embodied in Findings 35 and 38 (R. 1231, 1232) and are the foundation for the Court's Conclusion of Law No. 3:

> "3. Mosher had a direct contractual relationship with Union, and Mosher gave Fluor the written notice required by 40 U.S.C. Section 270b."

This Conclusion is the sole basis for the judgment against these appellants.

Fluor and the Sureties challenge the validity of these findings and conclusions and adopt the arguments contained in Union's brief which point out that the trial court erred in this respect.

It is the position of Fluor and the Sureties that, even assuming that the findings and conclusions have support in the record and the law, the relationship found to exist between Mosher and Union is not the "direct

contractual relationship" contemplated by the Miller Act. In considering this question, it is necessary to ascertain and give effect to the intention and purpose of the legislature in the adoption of this statute. This is the fundamental rule of statutory construction. 82 C.J.S. 560.

"Direct contractual relationship" is not defined in the statute, but it is clear that the act, which is for the protection of materialmen, laborers and subcontractors, was intended to protect persons having contractual relationship with a subcontractor *as a materialman, laborer or sub-subcontractor.* As stated in MacEvoy:

> "The proviso of Section 2(a) which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who gives the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the expressed will of the framers of the Act" (88 L.Ed. 1168).

In support of this statement, the Court appends the following footnote:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond. H.Rep.No. 1263 (74th Cong., 1st Sess.), p. 3."

In essence, the judgment appealed from holds that

Graver had promised Mosher that it would pay IMI-Ward's debt if that joint venture failed to pay.

Whether the resulting legal relationship is suretyship or guaranty, or a contract for the benefit of a third party, or some other type of secondary liability, there is no language in the Miller Act which suggests, implies or infers that the Congress intended that the protection of the Miller Act extends to persons who claim a right to payment *other than as a materialman, laborer, or subcontractor.*

The fact that Mosher is also a materialman is beside the point. The judgment it seeks to sustain is based, not on that fact, but on the fact that the Court found that Graver had promised to pay IMI-Ward's debt to Mosher.

That judgment cannot be sustained against these appellants unless Mosher brings itself within the statute.

As the Supreme Court said in *U.S. ex. rel. Sherman v. Carter,* 1951, 353 U.S. 210, 1 L.Ed.2d 776, 782:

> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of non-federal buildings. The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his supplies of labor and material. Thus the Act provides a broad but not unlimited protection."

Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid.

This circuit is committed to an interpretation of the Miller Act and of the MacEvoy decision which in turn is based upon a reasonable interpretation of the statutory language and "congressional intent." In *Fidelity and Deposit Company of Maryland v. Harris* (1966) 360 F.2d 402, this Court said:

> "Recovery under the Miller Act is limited to those who have a direct contractual relationship, express or implied, with the prime contractor or a direct contractual relationship, express or implied, with a subcontractor of the prime contractor."
>
> * * *
>
> "It is easy to say in the abstract that any subcontractor who actually performs on the project site an integral part of the prime contract is covered by the bond, but the imaginable difficulties in application of the rules are manifold."
>
> * * *
>
> "In our opinion the virtues of certainty and uniformity in the law advanced by the MacEvoy interpretation of the Miller Act outweigh the alleged benefits of the enlarged scope of bond protection afforded by other interpretations of the act and other interpretations of the language and holding of the MacEvoy case." (360 F.2d 408, 409).

The Court declined to extend its interpretation stating that it was fearful that such interpretation "would have to destroy the MacEvoy rule as we have adopted it."

Similar reasoning should apply here. Mosher, the trial court held, was the recipient of Union's promise, but did not have a direct contractual relationship with Union as a *laborer, materialman or subcontractor.* To hold that *any person* could recover on the Miller Act bond merely because of the existence of a direct contractual relationship with a subcontractor, would completely distort

the intent and purpose of the Congress in adopting the Miller Act. As was said in MacEvoy:

> "Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself."

There is no conceivable way in which Fluor could protect itself in the fact situation presented by this case.

We respectfully submit that judgment against Fluor and the Sureties should be reversed.

BOYLE, BILBY, THOMPSON & SHOENHAIR
By *Harold C Warnock*
Attorneys for Appellants

THE FLUOR CORPORATION, LTD.,

FEDERAL INSURANCE COMPANY,

VIGILANT INSURANCE COMPANY,

INSURANCE COMPANY OF NORTH AMERICA,

GENERAL INSURANCE COMPANY OF AMERICA,

SEABOARD SURETY COMPANY,

AMERICAN RE-INSURANCE COMPANY,

EMPLOYERS REINSURANCE CORPORATION,

and

GENERAL REINSURANCE CORPORATION
9th Floor, Valley National Building
Tucson, Arizona 85701

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By *Harold C. Warnock*
Of Counsel